ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

KITSAP TENANT SUPPORT SERVICES, INC., **Petitioner,** **v.** **NATIONAL LABOR RELATIONS BOARD,** **Respondent.**	**Case No. 18-1187** **18-1217**

KITSAP TENANT SUPPORT SERVICES' MOTION TO CONFIRM EXCLUSIVE JURISDICTION LIES WITH THE DC CIRCUIT

I. THE NATURE OF THE MOTION

Pursuant to Fed. R. App. P. 27 and DC Circuit Rule 27, Kitsap Tenant Support Services Inc. requests the Circuit confirm that it has exclusive jurisdiction over this matter and that the NLRB is without authority to remand a portion of its decision to an administrative law judge for further proceedings after the record of the underlying proceedings has been transferred to the Circuit.

II. BACKGROUND AND PROCEDURAL HISTORY

On May 31, 2018, some four years after the Administrative Law Judge's decision, the NLRB issued its decision. (Doc. #1745836). On July 13, 2018 KTSS filed a Petition for Review. (Doc #1740798). On August 8, 2018 the NLRB filed a Petition to Enforce. (Doc. #1744647). Both the KTSS and NLRB asserted the petition was based upon a final order of the Board. The record of the proceedings was transferred to the court on August 30, 2018 (Doc. #1748108). Five months after its decision, the NLRB issued an order to show cause why the issue of the lawfulness of certain policies should not be remanded to an ALJ. (Ex. 1). Despite KTSS' opposition, the NLRB decided to remand the issue of the lawfulness of policies in light of the *Boeing* decision and asserted this Circuit does not have jurisdiction over the work rules allegations because the issue had been severed. The Order Remanding issued nearly four months after the record had been transferred to the Circuit and seven months after the Board decision. (Ex. 2). The Division of Judges of the NLRB has scheduled a conference on January 24, 2019 to determine hearing dates and further proceedings. (Ex. 3).

III. ANALYSIS AND ARGUMENT

A. The NLRA limits the Board's authority.

Congress granted the Board limited authority to modify findings and orders:

> Until the record in a case shall have been filed in a court…the Board may at any time upon reasonable notice and in such manner

> as it shall deem proper, modify or set aside, in whole or part, any finding or order made or issued.
>
> 29 U.S.C. §160(d)

However:

> Upon filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final...
>
> 29 U.S.C. § 160(e)

This Circuit has held:

> Absent a remand, the Board may neither reopen or make any additional rulings on a case once exclusive jurisdiction vests in the reviewing court.
>
> *George Banta v. NLRB,*
> 686 F.2d 10, 16 (DC Cir. 1982).

See also: *NLRB v. Lundy Packing Co.*, 80 F.3d 25, 26 (4th Cir. 1996). Here the record was transferred on August 30, 2018 and the court obtained exclusive jurisdiction. The Board was without jurisdiction to act.

The Board asserts that the court did not obtain jurisdiction of the issue of work rules because the Board had severed the issue, relying on language in the Board decision that said "we find that it will effectuate the policies of the Act to sever these allegations and retain them for further consideration" (Doc. #1745836 page 24 Ex. 4). That language appeared only in the body of the Board decision but did not appear in the amended conclusions of law or remedy.

B. The Board reliance on *Steven's Media* is incorrect.

The Board asserts that "the court's jurisdiction is only exclusive as to the non-severed matters that are encompassed within the Board's final order. It does not extend to the severed matters that the Board expressly did not reach in its order" (Ex. 2 p.1-2). To support that assertion the Board relies upon *Stephens Media LLC. V. NLRB*, 677 F.3d 1241, 1249-1250 (DC Cir. 2012). Reliance on that case is inappropriate. The issue before the circuit was whether the decision before the court sans the severed issue was a final order. The *Stephens Media* decision did not address the issue of whether the Board had authority to sever an issue, wait some seven months after its decision and four months after the record was transferred, and remand the issue to an ALJ for further proceedings despite the Court's exclusive jurisdiction. There is nothing in the Board's rules and regulations (29 C.F.R. §102.49-.50) or the Rules of this Circuit that allow the Board to act in any manner once the record of the proceedings is transferred to the court.

C. The Board's dilatory conduct.

The Board's asserted reason for the need to remand is that the *Boeing* case 365 NLRB No. 154 (2017) changed the analysis. However, the *Boeing* case was decided on December 14, 2017, five months before the Board issued the decision in this case. The Board could have remanded the work rules issue before it issued the decision. It did not do so. The Board could well have decided the issue in its May 31, 2018 decision or issued a remand. It did not do so. Instead it waited seven

months after its decision and four months after the record was transferred to remand. The Board offers no explanation for its dilatory conduct in the remand (much less explaining why four years were required to issue the decision).

D. The detriment to KTSS.

In *Exportal LTDA v. United States*, 902 F.2d 45, 48 (DC Cir. 1990) this court considered whether the severed issue was intertwined with the findings the court was to review and whether such review would disrupt the orderly process of adjudication. It is important to consider that in its decision the Board found as to Bonnie Minor "having found Minor's discharge violated Section 8(a)(3) we find it unnecessary to pass on whether her discharge was also unlawful under this alternative theory of violation because doing so would not materially affect the remedy." (Ex. 4; Doc. #1745836 p. 24). Thus, KTSS faces the problem that this court will likely find the Board's decision regarding Minor was wrong but still face the alternative claim on remand that Minor was discharged because of an unlawful policy. KTSS would be forced to relitigate the issue of Minors discharge.

It is also detrimental to KTSS that we are now addressing this issue some seven years after the charges were filed, (Doc. #1760666 p. 7) five years after the ALJ decision and more than six months after the Board decision. The Board offers no explanation for the serious delay. Upon finding of unreasonable delay a court will grant appropriate equitable relief to remedy the delay. *Cobell v. Norton*, 240

F.3d 1081, 1108 (DC Cir. 2001). However the court has the power to grant equitable relief even absent a finding of unreasonable delay. *Mashpee Wampanoag Tribal Council v. Norton*, 336 F.3d 1094, 1102 (DC Cir. 2003).

In light of the Board's unreasonable delay and the determinant KTSS will suffer regarding the Bonnie Minor issue, the court should preclude the Board from acting further on the remand because it is the Circuit that has "exclusive jurisdiction".

E. The statute.

29 U.S.C. § 160(e) provides the jurisdiction of the court is exclusive upon filing of the record. The statute is clear and unambiguous that the NLRB cannot act. Both the Board and petitioner asserted the Board decision was final. There is no provision that allows the Board to piecemeal its decision. There is no explanation for the Board's dilatory conduct or why the issue of the policies and work rules could not have been decided much earlier.

The Board is without jurisdiction to remand.

Date: January 11, 2019

/s/ *Gary E. Lofland*
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(b) of the Federal Rules of Appellate Procedure, I hereby certify that the textual portion of the foregoing brief (exclusive of the opening certificate, disclosure statement, tables of contents and authorities, certificates of service and compliance, statutory addendum but including footnotes) contains 1,226 words as determined by the word-counting feature of Microsoft Word.

Dated: January 11, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of January, 2019, on behalf of Petitioner Kitsap Tenant Support Services Inc., I electronically filed the foregoing document with the Clerk of the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system, which will send notification of such filing to the following counsel:

Linda Dreeben: linda.dreeben@nlrb.gov

Julie Broido: julie.broido@nlrb.gov

Milakshmi Rajapakse: milakshmi.rajapakse@nlrb.gov

Date: January 11, 2019

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Exhibit 1

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

KITSAP TENANT SUPPORT SERVICES, INC.	Cases	19-CA-074715
		19-CA-079006
and		19-CA-082869
		19-CA-086006
WASHINGTON FEDERATION OF STATE		19-CA-088935
EMPLOYEES, AMERICAN FEDERATION OF		19-CA-088938
STATE, COUNTY AND MUNICIPAL		19-CA-090108
EMPLOYEES, COUNCIL 28, AFL-CIO		19-CA-096118
		19-CA-099659

NOTICE TO SHOW CAUSE

On June 4, 2014, Administrative Law Judge Jay R. Pollack issued a decision in this case. The General Counsel filed exceptions and a supporting brief, and the Charging Party adopted the General Counsel's exceptions and supporting brief as its exceptions and brief. The Respondent filed an answering brief, and the General Counsel filed a reply brief. The Respondent also filed cross-exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

On May 31, 2018, the Board issued a Decision and Order severing and retaining for further consideration certain complaint paragraphs.[1] The severed complaint paragraphs allege that several rules in the Respondent's employee handbook violate Section 8(a)(1) of the National Labor Relations Act based on the prong of the analytical framework set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), that held an employer's maintenance of a facially neutral work rule would be unlawful "if employees would reasonably construe the language to prohibit Section 7 activity." Id. at 647. Recently, the Board overruled the *Lutheran*

[1] 366 NLRB No. 98. The Board ruled on the other complaint allegations that were before it on exceptions.

Heritage "reasonably construe" test and announced a new standard that applies retroactively to all pending cases. *The Boeing Co.*, 365 NLRB No. 154, slip op. at 14-17 (2017).

Accordingly, the Board hereby issues the following notice to show cause why the severed complaint allegations should not be remanded to the judge for further proceedings in light of *Boeing*, including, if necessary, the filing of statements, reopening the record, and issuance of a supplemental decision.

NOTICE IS GIVEN that any party seeking to show cause why this case should not be remanded to the administrative law judge must do so in writing, filed with the Board in Washington, D.C., on or before October 29, 2018 (with affidavit of service on the parties to this proceeding). Any briefs or statements in support of the motion shall be filed on the same date.

Dated, Washington, D.C., October 15, 2018.

By direction of the Board:

/s/ Roxanne L. Rothschild

Executive Secretary

Exhibit 2

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

KITSAP TENANT SUPPORT SERVICES, INC.	Cases	19-CA-074715
		19-CA-079006
and		19-CA-082869
		19-CA-086006
WASHINGTON FEDERATION OF STATE		19-CA-088935
EMPLOYEES, AMERICAN FEDERATION OF		19-CA-088938
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		19-CA-099659

ORDER REMANDING

On May 31, 2018, the National Labor Relations Board issued a Decision and Order in this proceeding that resolved multiple complaint allegations and severed for further consideration allegations that the Respondent violated Section 8(a)(1) of the Act by maintaining various work rules. See 366 NLRB No. 98 (2018). On October 15, 2018, the Board issued a Notice to Show Cause why the severed allegations should not be remanded for further consideration under *The Boeing Co.*, 365 NLRB No. 154 (2017). The General Counsel filed a response, stating that he was not opposed to remand. The Respondent filed a response opposing remand.

Having duly considered the matter, including the arguments raised by the Respondent, we find it would effectuate the purposes of the National Labor Relations Act to remand this proceeding for further consideration in light of *Boeing*.[1]

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[1] Citing Sec. 10(d) and (e) of the Act, the Respondent contends that the Board cannot remand the severed allegations because it lost jurisdiction over them when the administrative record was filed in the United States Court of Appeals for the District of Columbia Circuit after the Respondent filed a petition for review of the Board's May 31, 2018 Decision and Order in that court. The Respondent is mistaken. First, Sec. 10(d) provides that the Board can modify or set aside any "finding or order" it has made or issued in a case until the underlying administrative record is filed in court. Here, the Board has not made any finding or issued any order as to the severed work-rule allegations, so Sec. 10(d) is not triggered. Second, although Sec. 10(e) provides that the jurisdiction of the court of appeals becomes "exclusive" upon the filing of the administrative record, the court's jurisdiction is only exclusive as to the non-severed matters that

IT IS THEREFORE ORDERED that, because Judge Jay R. Pollack has retired, this proceeding is remanded to Chief Administrative Law Judge Robert A. Giannasi to designate another administrative law judge in accordance with Section 102.36 of the Board's Rules and Regulations.

IT IS FURTHER ORDERED that the administrative law judge designated shall reopen the record, if necessary, and prepare a supplemental decision addressing the complaint allegations affected by *Boeing* and setting forth credibility resolutions, findings of fact, conclusions of law, and a recommended Order. Copies of the supplemental decision shall be served on all parties, after which the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

Dated, Washington, D.C., December 6, 2018.

By direction of the Board:

Roxanne Rothschild
Acting Executive Secretary

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are encompassed within the Board's final order. It does not extend to the severed matters that the Board expressly did not reach in its order. See, e.g., *Stephens Media, LLC v. NLRB*, 677 F.3d 1241, 1249-1250 (D.C. Cir. 2012) (holding that the presence of a severed issue does not undermine the finality of the order or impede the court's review of unrelated matters addressed in the order; nor does the court's review impede continued consideration of a severed issue by the Board). The Respondent also contends that remand is precluded by the doctrine of laches, but that doctrine has no application to cases brought before the Board. See, e.g., *Merrell M. Williams*, 265 NLRB 506, 508 (1982).

Exhibit 3

Sandra Lepez

From: DiCrocco, Brian <Brian.DiCrocco@nlrb.gov>
Sent: Thursday, December 13, 2018 4:58 PM
To: Gary Lofland; edy@ylclaw.com; Fiol, Richard C.
Cc: Lee, Vanise J.; Gomez, Doreen E.; Mills, Kathlyn; Pomerantz, Anne
Subject: Conference call now scheduled: Notifying parties of date, time, and call-in instructions: 19-CA-074715 - Kitsap Tenant Support Services, Inc.

Dear Counsel,

We now have a pre-trial conference call scheduled in the above-referenced case, **Thursday, January 24, 2019 at 9:30 a.m. Pacific Time.**

A few minutes before the scheduled time for the conference call, please call **877-360-6572** and, when prompted, enter the Conference ID **3676894**. The system will then verify your access code and you will be connected with the conference call. If you have any difficulty connecting to the call, please call 415-356-5255 to request assistance.

Thank you for your assistance in scheduling this call.

Brian C. DiCrocco, Legal Tech.
NLRB Division of Judges San Francisco
628-221-8821

Exhibit 4

ly, we find that the Respondent violated Section 8(a)(3) when, on August 15, it issued Hennings a letter of direction for failing to complete narratives and medical charting.

d. The February 4, 2013 administrative leave and February 6, 2013 demotion

We find that the Respondent also violated Section 8(a)(3) on February 4, 2013, when it placed Hennings on administrative leave, and on February 6, 2013, when it demoted Hennings. Two months earlier, the Respondent continued to show antiunion animus when Frey, in the presence of the Respondent's owner, accused Hennings of involvement in the Union's protest march outside the owner's home, stating, "You're union, you're involved." But even apart from this statement, the Respondent's adverse employment actions on February 4 and 6, 2013, violated the Act because they were based in part on discipline we have found unlawful. When Frey placed Hennings on administrative leave, he generally cited his serious concerns with her work, which logically encompasses work-related conduct for which Hennings had been unlawfully disciplined. And Hennings' demotion letter expressly relied on unlawful discipline, citing Hennings' April 12 written warning and August 10 and 15 letters of direction. Accordingly, the Respondent violated Section 8(a)(3) when, on February 4, 2013, it placed Hennings on administrative leave without pay, and when, on February 6, 2013, it demoted her. See *Hays Corp.*, 334 NLRB 48, 50 (2001) ("It is well settled that, where a respondent disciplines an employee based on prior discipline that was unlawful, any further and progressive discipline based in whole or in part thereon must itself be unlawful.").

e. The August 2012 written warning for leaving a client at a party

We also find that the Respondent has shown that it would have issued Hennings the August 2012 written warning even absent her protected activity. It is undisputed that one of Hennings' clients was attending a party, that Hennings was supposed to remain with this client, and that Hennings left the residence where the party was held to attend to a matter unrelated to work (helping her daughter, who had locked herself out of her home). The General Counsel introduced comparator evidence, but we find this evidence too dissimilar to show that Hennings was treated disparately. The General Counsel also points out that the Respondent did not discipline staff at the residence who agreed to watch Hennings' client. However, those employees remained at their assigned residence, while Hennings admittedly left her assigned residence to perform a matter unrelated to work. Finally, the General Counsel contends that Frey provided shifting explanations for his decision to issue Hennings this written warning, in that Frey initially testified that he disciplined Hennings because she left two clients alone at the residence, and Frey later acknowledged that Hennings had in fact left just one client alone. The General Counsel's contention is meritless. Frey testified that he disciplined Hennings because it is improper for an employee to leave clients—regardless of how many—when the employee is responsible to monitor them. Accordingly, like the judge, we dismiss the complaint allegation that the Respondent violated Section 8(a)(3) when it disciplined Hennings for doing so.

III. THE SECTION 8(A)(1) WORK-RULE ALLEGATIONS

The complaint alleges that the Respondent violated Section 8(a)(1) of the Act by maintaining seven handbook rules: (1) Professional Boundaries, (2) Professional Standards, (3) Conditions of Employment, (4) Misconduct, (5) Canvassing or Soliciting, (6) Employee Professional Relationships, and (7) Reasons for Termination. We find that it will effectuate the policies of the Act to sever these allegations and retain them for further consideration.

In addition to alleging that the discharges of Minor, Driskell, and Martell violated Section 8(a)(3) of the Act, the General Counsel also contends they were unlawful under Section 8(a)(1) on the basis that the Respondent discharged each of these employees pursuant to an allegedly overbroad rule. Having found Minor's discharge violated Section 8(a)(3), we find it unnecessary to pass on whether her discharge was also unlawful under this alternate theory of violation because doing so would not materially affect the remedy.[35] As to the discharges of Driskell and Martell, we find no merit to the General Counsel's 8(a)(1) theory of violation because the record fails to demonstrate that the Respondent relied on any allegedly unlawful work rule as a basis for their discharges. The letters of termination issued to Martell in July and to Driskell in September do not cite any of the rules alleged to be unlawful, nor is there any clear indication in the record that the Respondent otherwise relied on any of those rules when it discharged Martell and Driskell.

IV. STRICTER ENFORCEMENT OF RULES IN RESPONSE TO UNION ACTIVITY

The complaint alleges that the Respondent violated Section 8(a)(3) by "chang[ing] its past practice of not

[35] Having found it unnecessary to pass on this theory of violation, Chairman Ring does not reach the legal issue of whether an employer violates Sec. 8(a)(1) by disciplining an employee pursuant to an unlawfully overbroad work rule.